In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1138

JOHN ELWYN PROTHRO, SR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MIKE A. HATCHELL,
Box 629,
Tyler, Texas 75701
Attorney for Petitioner.

SUBJECT INDEX

LIST OF AUTHORITIES

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To the Honorable Supreme Court of the United States:

Comes now John Elwin Prothro, Sr., as defendant-petitioner, and prays the court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, rendered herein December 10, 1975.

As grounds therefor, petitioner would show the court as follows:

THE OPINION BELOW

The judgment of the Fifth Circuit was rendered December 10, 1975, by memorandum order under its Local Rule 21. That order is reproduced as Appendix A.

A petition for rehearing, timely filed December 24, 1975, was considered on the merits and overruled by order dated January 14, 1976. That order is reproduced as Appendix B. This petition, accordingly, is due to be filed February 13, 1976. Rule 22(2), Rules of the Supreme Court of the United States.

Jurisdiction of the court is invoked under 28 *U.S.C.* §1254(1).

QUESTIONS PRESENTED FOR REVIEW

(1) Whether or not the government sustained its burden under 18 *U.S.C.* §1001 and 18 *U.S.C.* §2 by proving (a) concealment of a material fact by "****trick, scheme, or device***", (b) willful and knowing intent to conceal such fact, and (c) that the fact allegedly concealed was material to the functioning of a department of government.

(2) Whether or not the destruction of F.B.I. Agent Bremer's handwritten interview notes of a conversation with petitioner was a violation of the Jencks Act (18 *U.S.C.* §3500) for which violation the agent's testimony should have been suppressed in its entirety.

STATUTES INVOLVED

The pertinent statutes involved are:

(1) 18 *U.S.C.* §1001:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) 18 *U.S.C.* §2 *(in pertinent part):*

> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

(3) 18 *U.S.C.* §3500 *(in pertinent part):*

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> * * * * *
>
> (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; ***

STATEMENT OF THE CASE

Petitioner was indicted under two counts for allegedly concealing a material fact from the Department of

Housing and Urban Development in conjunction with an application for project mortgage insurance in violation of 18 *U.S.C.* §1001 and 18 *U.S.C.* §2. (App. 1090.) *

Pursuant to a jury verdict of "guilty" on each count (App. 1108), petitioner was given a three year probated sentence and assessed a fine of $10,000. (App. 1113.)

The United States Court of Appeals for the Fifth Circuit affirmed under its Local Rule 21 without filing a formal written opinion.

The record in this case is voluminous and the administrative context in which the alleged violation arose is technical and highly complex. Rather than overburdening the petition at this point with a detailed recitation of those facts, for consideration of petitioner's first point, we have provided the court respectively:

(a) an analysis of the administrative procedure through which applications for FHA project mortgage insurance are processed (App. C) — an understanding of which is essentially prerequisite to any understanding of the facts themselves, and

(b) a synopsis of the proof regarding the alleged concealment. (App. D.)

The facts pertinent to petitioner's second ground are more narrow and can be succinctly and more logically stated in the argument on the issue.

On the basis of those facts, petitioner advances the following reasons for granting his petition:

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* All "App." references are to the certified appendix filed as part of the record in this court.

REASONS FOR GRANTING THE PETITION

I.

Failure of the evidence to sustain the elements of the crime

Petitioner submits that, from the evidence outlined in Appendix D, it is apparent the government failed to meet its burden of proving each critical element of the statute upon which the indictment was based, to wit:

A. There was no concealment: From the undisputed, unrefuted, and unimpeached testimony of the petitioner's attorney, Norman Nelson — which we submit must be accepted as true, *Gibson v. Southern Pacific Co.*, 67 F.2d 758, 762 (5th Cir., 1933), cert. den., 291 U.S. 673 — it appears that the very fact alleged to have been concealed from FHA (i.e., sponsor acquisition cost) was revealed to FHA in the course of its administrative process at a pre-feasibility conference referable to each of the two projects in question.

The knowledge of the salient fact was imparted to the local Director of FHA, himself, and his top assistants who subsequently had responsibility in processing the projects. The knowledge imparted to FHA through those officials permeated the entire agency and is deemed to have been within its collective knowledge at all material times. *United States v. Shelby Iron Co.* 4 F.2d 829 (5th Cir., 1925), rev'd on other grounds, 273 U.S. 571; *United States v. Hanna Nickel Smelting Co.*, 253 F. Supp. 784, 793 (D.C. Ore., 1966). Thus, there could have been no concealment. *United States v. Long*, 14 F. Supp. 29 (D.C. Mass., 1936).

B. There was no "trick, scheme or device***":*** The concealment was alleged to have been perpetrated through certain options submitted to FHA which supposedly concealed the fact that the property upon which the projects were to be built had been previously purchased by petitioner at a price lower than that shown on the options.

Those options, in the precise form in which they were submitted, conformed to a long standing requirement condoned by the agency and which had been used in many, many projects of a similar nature (See DX 302, 304, and 305; Appendix 904-905, 1180-1185, 1231.)

Moreover, by their precise legal nature, the options were not representations of ownership so as to conceal sponsor acquisition cost. In Texas, where the options were taken, an option on real property does not amount to a conveyance of the property nor does it vest any interest in the property. *Knox v. Brown*, 277 S.W. 91, 94 (Tex. Com. App. 1925), *Lusher v. First National Bank of Fort Worth*, 260 S.W.2d 621, 626 (Tex. Civ. App., 1953, writ ref., n.r.e.). Even if the optionor has no title, or imperfect title, the option is not invalid (and thus is not necessarily a "***trick, scheme, or device***") if the optionee is aware of the state of the title at the time the option is taken, as is the case here. See 77 Am. Jur. 2d 232 "Vendors & Purchaser,' §47 (1975).

If FHA *construed* the options to be a representation of a fact they did not purport to represent, that is no basis for criminal implication under 18 *U.S.C.* §1001 by virtue of their submission to FHA because, as said in *United States v. Diogo*, 320 F.2d 898 (2nd Cir. 1963): "***we must look to the meaning intended by the appellants themselves, rather than to the interpretation of the statements which the . . . authorities *did in fact make*, or even to the interpretation which the authorities *might reasonably have made.****" (320 F.2d 906, emphasis by the court.)

C. There was no knowing and willful intent to commit a crime: To visit upon petitioner a specific intent to willfully commit the crime of concealment — another necessary requirement, *United States v. Markee*, 425 F.2d 1043, 1046 (9th Cir. 1970) — required the government to convict him of a substantial amount of "foreknowledge" and "inside knowledge" of FHA operations, including:

(1.) That he knew for what purpose "options" were used by FHA in processing insurance applications; specifically, that "options" were not used to evidence "site control" — the only purpose for which the options in this case were submitted. (App. 355, 365-366, 406, 422, 445, 485-486, 793-794, 959.)

(2.) That he knew how FHA appraisers derived land values and what instruments they relied upon in so doing.

(3.) That he knew the instructions and requirements contained in FHA appraisal manuals.

(4.) That he knew how a maximum insurable mortgage was determined, what regulations were contained in FHA manuals for determining that figure, and what interpretations were made of those regulations.

(5.) That he knew "total replacement cost" would be *the* test by which the maximum insurable mortgage was determined on Form 2264-A for the projects he was sponsoring.

(6.) And, that he knew the regulations, and interpretations of those regulations, by which the amount of the "initial draw" was determined.

The lack of such evidence, which is patent, precludes, we submit, a finding in this case of the requisite *mens rea* elements of 18 *U.S.C.* §1001 and §2. See *United States v. Markee, supra; United States v. Heithaus*, 391 F.2d 810 (3rd Cir., 1965).

D. Sponsor acquisition cost was not "material": The requirement of "materiality", i.e., that a concealed

fact actually pervert the function of a governmental agency, *Tzantarmas v. United States*, 402 F.2d 163, 168 (9th Cir., 1968), cert. den. 394 U.S. 966; *United States v. East*, 416 F.2d 351-353 (9th Cir., 1969), is the most blatant deficiency in the record for several reasons:

(1.) FHA officials and appraisers confirmed that the "options" submitted by petitioner did not, and could not, influence appraisals of the project property. (App. 441, 794-797, 801.)

(2.) Although one FHA official (not connected with these projects) disagreed (App. 447, 463), the FHA official in charge of approving the projects in question agreed that, under FHA regulations (¶7302.3, FHA underwriting Manual, GX 90, App. 1175), the "initial draw" was not limited by sponsor acquisition cost, so that concealment of the cost would not affect the amount of monies distributed at the "initial closing". Even if it did, any excess paid would not affect the amount of insurance to which the agency was committed. (App. 493.)

(3) And, while the government did prove that a discrepancy between appraised value and sponsor acquisition cost would require additional *documentation* and *explanation* by the appraiser (GX 91, App. 1176-1177), it wholly failed to show that such discrepancy rendered the independent FHA appraisal subject to review and potential *change* because of that discrepancy. Insofar as the record shows, the effect of any discrepancy was merely upon the procedural or "bookkeeping" functions of FHA, not upon its insuring function.

Thus, at no point from beginning to end, was sponsor acquisition cost "material" to the ultimate insuring function of FHA. Compare *Rolland v. United States*, 200 F.2d 678, 679-680 (5th Cir., 1953), cert. den. 345 U.S. 964.

In toto, therefore, the sum and substance of the record falls short of the evidentiary requirements upon the government to prove each element of 18 *U.S.C.* §1001 beyond reasonable doubt.

II.

Destruction of interview notes by FBI Agent Wilton Bremer.

This point presents a matter upon which the courts of appeals differ and to which this court should speak.

The complaint arises from the following circumstances:

Wilton Bremer, an FBI agent, gave extensive testimony of an interview with petitioner in which he liberally refreshed his recollection from a typewritten interview report, which was dictated September 29, 1972, from the handwritten notes of the interview conducted September 25, 1972. (App. 561, 572.) The notes were subsequently destroyed under the auspices of FBI routine. (App. 571, 601, 607.)

Bremer related that, during his interview of petitioner, he (Prothro) supposedly stated that the options in question had been submitted to gain "contingency money" or an "operating cushion" (App. 594), a fact which the government proclaimed loudly and forcefully during its jury argument. (App. 1017-1018, 1053-1054.) Indeed, this was all the government could point to as evidence of "motive" or "intent". During the course of Bremer's examination, it was disclosed that the typewritten interview report had contained substantial typographical errors (App. 609), that Bremer had made substantial editorial notes on the report (App. 647-650), and that, in fact, he had changed one sentence of the report to make it speak exactly the opposite. (App. 609, 667-668.)

Petitioner made demand for production of the written notes and also moved to strike Bremer's entire testimony for failure to produce the same. (App. 664, 680.) Both motions were overruled. (App. 664, 681.)

Because of the circumstances just recited, petitioner submits that the trial court erred in overruling those motions for the following reasons:

(1) That Bremer's handwritten interview notes constituted a "statement" within 18 *U.S.C.*, §3500, to which petitioner was entitled for the purposes of impeachment.* *Holmes v. United States*, 271 F. 2d 635, 638 (4th Cir., 1959.) Other cases hold that such notes are not "statements" under the Act, e.g. *U.S. v. Johnson*, 337 F.2d 180 (4th Cir. 1964), aff'd. 383 U.S. 169. Thus, the conflict.

(2) That, in addition to the statute, petitioner was entitled to the handwritten notes under the due process guaranteed him by the Fifth Amendment to *The Constitution of the United States. Jencks v. United States*, 77 Sup. Ct. 1007, 353 U.S. 57, 1 L.Ed 2d 1103 (1957).

(3) That, because of the cruciality of Bremer's testimony and the inherent fallacies in the typewritten report, the violation of petitioner's constitutional and statutory rights required that Bremer's testimony be suppressed in full. See *United States v. McCarthy*, 301

* Note particularly that the handwritten interview notes were not "verbatim" transcripts of Frothro's statements to the witness but were Bremer's description of the conversation. (App. 601, 612-613.) The subsequently-transcribed report was compared with the interview notes "***for accuracy***" (App. 601), the latter then being destroyed. (App. 607.) We would submit that this comparison for accuracy amounted to an adoption or approval of the interview notes as Bremer's own statement within the meaning of 18 *U.S.C.* 3500(e)(1).

F. 2d 796 (3rd Cir., 1962); *United States v. Johnson*, *supra*; *United States v. Sheer*, 278 F. 2d 65 (7th Cir., 1960) and *United States v. Lonardo*, 350 F. 2d 523 (6th Cir., 1965).

More than ten years ago, the FBI was cautioned to *cease* destroying interview notes of the defendant or government witnesses. In *United States v. Johnson*, 337 F. 2d 180 (4th Cir., 1964), aff'd 383 U.S. 169, it was held:

> "This is not the first time that the court has been called upon to consider the effect of the destruction of FBI interview notes. ***Each time the problem has arisen the FBI has claimed that the notes were destroyed as part of FBI routine. This is not really a satisfactory answer.*** One of the purposes of both the Jencks decision and Jencks Act is to afford the defense an opportunity to impeach witnesses. ***The destruction of interview notes does not advance this purpose.***" (337 F. 2d 202.)

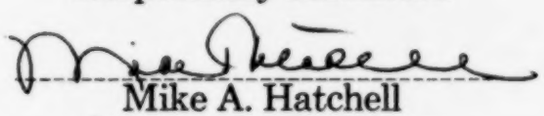
See also *United States v. Missler*, 414 F. 2d 1293, 1304 (4th Cir., 1969), cert. den. 397 U.S. 913.

The FBI has refused to heed this admonition time and again as most recently evidenced by this case. The time has come, through this case, to put an end once and for all to this invidious and constitutionally treacherous practice.

WHEREFORE, PREMISES CONSIDERED, it is prayed that this petition for writ of certiorari be granted and, upon final hearing, that the judgments of the lower courts be reversed. Petitioner additionally prays

for such other and further relief to which he may justly be entitled at law or in equity.

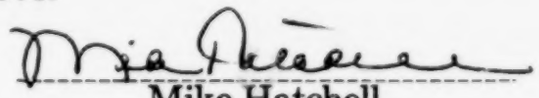
Respectfully submitted



Mike A. Hatchell
Attorney for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing Petition for Writ of Certiorari has been served upon attorney for the government, Mr. William F. Sanderson, Jr., Assistant United States Attorney, Room 16 G-28, 1100 Commerce Street, Dallas, Texas, 75202, by placing the same in the United States mail, postage prepaid and properly addressed, on this the 7th day of February, 1976.



Mike Hatchell

APPENDIX

APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 75-1294

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN ELWYN PROTHRO, SR.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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(December 10, 1975)

Before THORNBERRY, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1] See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966

APPENDIX B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 75-1294

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN ELWYN PROTHRO, SR.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING
(JANUARY 14, 1976)

Before THORNBERRY, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX C

THE ADMINISTRATIVE PROCESS FOR OBTAINING FHA MORTGAGE INSURANCE

The process for obtaining FHA project mortgage insurance is generally invoked by an informal "pre-feasibility conference" at which the "sponsor" of a project and, perhaps, his attorney or consultant, meets with FHA staff to generally explore the feasibility of the proposed project in terms of FHA standards and criteria. (App. 456-458, 859.) If FHA decides, as a result of the pre-feasibility conference, that a contemplated project may qualify for FHA insurance, then, the local director issues a "feasibility letter" so stating and invites a formal application for insurance. (App. 859.) The formal administrative procedure proceeds thus:

1. The Feasibility Stage:

A. Form 2013—Feasibility: The basic document whereby a sponsor makes application for FHA insurance is Form 2013. (App. 433-434.) A 2013 application is submitted at three different stages — the "feasibility" stage, where the over-all feasibility of the project is studied, the "conditional" stage, wherein FHA issues a "conditional" commitment for insurance, and the "firm" stage at which FHA issues its "firm" or unconditional commitment for FHA insurance. (App. 434-435.) The "conditional" stage may be bypassed, although in the instant case it was not.

For present purposes, the significant portions of Form 2013 are:

1. *9B, "Information Concerning Land or Property"* — A space where, according to the instructions on the reverse of the form, the sponsor is to insert the "****stipulated purchase price****". There is no definition of that phrase in any FHA regulations or instructions. (App. 364.)

2. Line G70 — A place to insert the estimated market price of the project site.

3. Line H73 — A space for the insertion of the proposed cash required or indebtedness to be incurred by the mortgagor entity for purchase of the site.

4. Line I2 — A space to indicate the attachment of "Evidence of Site Control (Option or Purchase) ***".

5. Line I5 — A space to indicate the attachment of "Evidence of Last Arm's-Length Transaction Price". It is significant to notice that evidence of "site control" is indicated to be a separate attachment from the "last arm's length transaction". This will become significant, because it had become FHA practice to receive an "option" in favor of any member of a sponsoring group as the required evidence of "site control". (App. 406-408, 422, 445, 485-486, 793-794, 801, DX 302, App. 1175.) It is the government's position that "options" submitted in conjunction with Form 2013 to evidence "site control" had the effect of concealing the actual acquisition cost of the project property to the sponsors.

Once a Form 2013-Feasibility application is received with supporting documents, there commences a thorough in-house investigation by FHA to determine the acceptability of the location and the marketability of the project. (App. 435.)

B. Form 2264—Feasibility: The in-house processing centers principally around Form 2264 (e.g., GX 3A, App. 1133.) The basic purpose of Form 2264 is to arrive at an estimate of the value of a total project. As is obvious from its face, Form 2264 takes three approaches to valuation:

1. *The cost of replacement* — Total cost of construction (including financing, legal and organizational expenses, et cetera) plus current estimated market price of the site as determined by an FHA appraisal. (See GX 3A, p. 2, ¶G, App. 1134.) This approach is also known as "summation". (See GX 3A, p. 4, App. 1136.)

2. *The income approach* — An approach to value based upon capitalization of net income of the project pursuant to a specified capitalization rate. (GX 3A, p. 4, ¶K, App. 1136.)

3. *The comparison approach* — A value derived by comparison with sales of existing or similar projects. (GX 3A, p. 4, ¶L, App. 1136.)

Note: The approach utilized for a given project is dependent upon the section of the National Housing Act under which the proposed project qualifies. Thus, the court will note that not every approach to value is utilized in regard to the project at issue; some of them are either left blank or given the notation "N/A" (meaning "not applicable").

On the projects involved, "total replacement cost" was the significant approach to value. Again, for present purposes, the important thing to note is that, in reaching "total replacement cost" on Form 2264, the *actual* purchase price paid by the sponsor or the last *actual* sale by an owner of land does not figure into the computations; rather, the applicable land value included in the test is that determined by the FHA appraisal. (See GX 3A, p. 2, line G70 and compare with p. 3, line K9, App. 1134-1136.)

C. Form 2264—A: After the completion of Form 2264, a subsidiary form, Form 2264-A, is prepared. That form seeks to determine the maximum mortgage which FHA will insure. The form utilizes a number of different criteria for determining the maximum insurable mortgage, not all of which are applicable to projects of the kind involved here. (See DX 91, App. 1141.) The pertinent tests applicable to this case are:

1. *Amount stated in application* — The amount of insurance requested by Form 2013.

2. *Statutory dollar limit* — Statutory limit imposed by 12 U.S.C., §1713(c) (1) and 12 U.S.C., §1715(1) (a) (4) (i).

3. *Total replacement cost* — 90% of the total replacement cost as determined by Form 2264, line G70.

4. *Total family units* — Another statutory limitation. 12 U.S.C., §1715(1) (d) (4) (ii).

5. *Debt service ratio* — An amount determined by debt service in comparison to annual income of the project, i.e., annual income divided by the mortgage interest rate, percentage insurance premium and amortization rate. In practice, it is this test which usually determines the maximum insurable mortgage.

The foregoing standards are required either by statute or regulation. The lesser amount as determined by those criteria establishes the maximum insurable mortgage. Here, too, the *actual* price paid for land by the sponsor or the last *actual* sale by the owner plays no part in the determination, since the criteria are either statutory or extrapolated from previous valuations in which those matters played no part.

D. Invitation Letter: If the project appears to be feasible after preliminary appraisal by all FHA sections, the director issues a "feasibility letter" so stating and inviting a "conditional" or "firm" application within a given number of days for a stated maximum insurable mortgage. (App. 351-352, 434.)

This completes the "feasibility" stage.

2. The Conditional Stage:

A. Form 2013—Conditional: The first step at the "conditional" stage is for the sponsor to file another Form 2013 application plus preliminary drawings and

specifications. (e.g., GX 2, App. 1143.) The Form 2013-Conditional is roughly the same as the Form 2013-Feasibility, except that, generally, the estimated market price of the site and land indebtedness (lines G70 and H73) are conformed to the FHA appraised value for the site. (See GX 2, p. 2, App. 1144; App. 372, 377.)

B. Forms 2264 & 2264—A—Conditional: Once again the various FHA sections complete Forms 2264 and 2264-A in light of previous processing and the sponsor's additional submissions at this stage. (See GX 91A, p. 17-321.)

C. Conditional Commitment: If the project still appears to meet FHA criteria, this stage is concluded by a conditional commitment and invitation to submit a "firm" application for mortgage insurance within a given number of days upon a stated maximum mortgage.

3. The Firm Stage:

A. Form 2013—Firm: Likewise, processing at the final stage is commenced by filing a Form 2013 application for a "firm" commitment, plus final plans, specifications, cost breakdowns, et cetera. The information in this form is essentially the same as in previous forms, incorporating whatever changes may have occurred subsequently. (See DX 73, App. 1153.)

B. Forms 2264 & 2264—A—Firm: Again, the project is processed on Form 2264 which, at this stage, is generally utilized to confirm conclusions reached at the prior stages in light of the sponsor's current exhibits. (See GX 91A, p. 17-321.) The maximum insurable mortgage is also rechecked on Form 2264-A at this point. (See DX 72, App. 1156.)

C. Final Commitment: If a project is finally approved by FHA, the agency issues a commitment for

a maximum insurable mortgage, and the matter is set for an "initial closing".

D. Form 2283: After final commitment, and as "initial closing" approaches, the architect for the project certifies his fees and costs (See GX 5, App. 1166) and FHA prepares its Form 2283, which is a summary of the "cash" requirements for closing. (e.g., DX 99, App. 1164.)

By that form, there is computed the cash required by the mortgagor's construction contract (e.g., DX 99, line 7, App. 1164), to which is added various financing charges and fees (interest and taxes during construction, FHA fees, legal and organizational expense, etc.). (See DX 99, lines 9-23, App. 1164.) That total is compared with the maximum insurable mortgage and, if it exceeds that sum, the difference must be escrowed by the mortgagor. If the total cash required is less than the maximum insurable mortgage, the difference is, to use the words of the form, "Cash Available to Mortgagor" at the initial closing. (See DX 99, line 42, App. 1164.)

All of the expenses, fees and costs which are utilized on Form 2283 are described on the form itself as those due and owing by the "***mortgagor***", not the sponsor.

E. Form 2403: Form 2403 is a "closing" document entitled "Application for Insurance of Advance of Mortgage Proceeds". (See GX 5, App. 1170.) The "Request for Payment" portion of the form (App. 1171) is prepared by the mortgagor from the information contained on Form 2283, and it requests insurance upon the initial advance to cover various pre-construction items (e.g., architects' fees, FHA fees, organizational and legal expense, etc.) plus the "Cash Available to Mortgagor" as determined by Line 42 of Form 2283.

That figure is requested under the designation "Land" because of an FHA regulation (See GX 90, App. 1175) although there appears to be no requirement that the funds so advanced actually be spent for land acquisition. (App. 873-874, 875-976, 930.)

F. The Initial Closing: Upon approval of the request for payment per Form 2403, an "initial closing" is held at which numerous legal instruments (not necessary to mention here) are prepared in the presence of FHA attorneys and representatives and the initial advance, as requested by the mortgagor, is disbursed by the financing institution. (App. 505-513, 777-778.)

G. Form 2580: Form 2580 is the final closing document which is completed when the loan is fully disbursed and all costs are complete and certified. (See DX 200.) It is important to note that the only expenditure by the mortgagor which is *not* required to be cost-certified is the acquisition cost of land. (App. 715-718, 878.)

The foregoing does not, of course, attempt to minutely define all FHA procedures involved. Hopefully, it gives a brief and basic outline of those procedures which are directly involved in this appeal which basically involve those from the pre-feasibility conference to the "initial closing".

APPENDIX D
STATEMENT OF THE PERTINENT FACTS

Following is a summary of the pertinent facts upon which petitioner's conviction was obtained:

In 1968, prior to the time involved here, John Prothro sponsored, and ultimately became a part of the mortgagor entity, which constructed and owned two projects backed by FHA insured mortgages — Village East Nursing Home and Village East Apartments. (See GX 182, DX 302, App. 1180; App. 342, 846-848, 938-940.)

Inasmuch as the forms required to be submitted to obtain FHA insurance were altogether too complicated for the uninitiated (App. 202), and, since one could obtain little help from FHA in completing the forms (App. 202), Mr. Prothro sought the assistance of Norman Nelson, an attorney experienced in FHA matters. (App. 845-846, 939.) Nelson made all submissions required by FHA for Prothro in conjunction with the Village East projects upon the standard 2013 forms which had been signed in blank by Prothro and left for Nelson to complete as he deemed appropriate. (App. 847, 939.)

It was in conjunction with the Village East projects that Prothro became aware of FHA's insistence upon the sponsor furnishing an "option" upon the site for the proposed project. One of the attachments required by form 2013 is designated as "Evidence of Site Control (Option or Purchase) * * *" by, we assume, the ultimate mortgagor (see GX 1, page 2, ¶12, App. 1130) and, since the ultimate mortgagor hardly ever came into existence until just before closing, it had become universal practice for sponsors to submit an option upon the proposed project site to satisfy that requirement. (App. 903-905.) Thus, we see, for example, in conjunction with Village East Nursing Home, Prothro's first FHA insured project, a letter from Director E. J. Dee, requiring that:

"An option should be submitted which incorporates the dollar amount." (DX 302, ¶2, App. 1180.)

The singular purpose in submitting such an option, as understood by parties both in and outside FHA, was to demonstrate requisite "site control". (App. 355, 365-366, 406, 422, 445, 485-486, 793-794, 959.) Or, as Jake Waddle, FHA's chief appraiser when these projects were processed, testified:

"Q. Will you tell us, Mr. Waddle, based upon your experience with FHA, what FHA wanted in 1969 and 1970 when they asked a sponsor to submit a 2013 application and option?

A. They wanted the option or sales contract showing that the sponsor of the project, proposed project, had possession of the proposed site." (App. 793-794.) *

Admittedly, FHA's insistence upon an "option" was not always legally rational, and what it deemed to satisfy its requirement for the same sometimes seemed nonsensical. For example, the evidence reveals at least two transactions where individuals or entities, in their capacities as sponsors, gave *themselves* an "option" in their capacity as ultimate mortgagor, the option being signed by the same person as both "optionor" and "optionee"; all of that was, nevertheless, what FHA wanted, what it approved and what it condoned. (App. 903-905.) **

---

* A subsidiary purpose of the option (evidenced by the requirement of "*** a dollar amount ***" — DX 302) apparently is to indicate, at the beginning of the administrative process, the *value* at which the land is to be placed into the project by the sponsors to support statements to that effect required by Form 2013. (See GX 1, p. 2, lines G70 and H73, App. 1130; App. 369, 372-373, 404, 865-866, 921.)

**Note also that the dollar amount stated in those options was greater than the sponsors had paid for the land. (App 904-905.)

At any rate, those were the ground rules extant at the time of the subject transactions and, at all material times, Mr. Prothro was attempting to do nothing more than to comply with those regulations in good faith as he and his advisors understood them. (App. 847-848, 871-872, 933.)

During the course of the Village East project, Mr. Prothro became interested in two other types of projects — an apartment complex under §221(d) (4) of the National Housing Act and a mobile home park under §207 thereof — out of which transactions the present indictment grew. For clarity, those projects will be described separately, to-wit:

A. The Casa Grande Apartments

(1) *Land Acquisition:* In late 1968 or early 1969 (App. 28), Mr. Prothro located a 32 acre tract of land just outside the City of Tyler for sale at a highly favorable price (App. 943-944) and, by warranty deed dated April 11, 1969, and recorded twelve days later (GX 20, App. 1114), he ultimately purchased the tract from the owners, E. J. and Naomi Burke, for $2,000 an acre. (App. 29-32, 943-945.)

Inasmuch as Prothro thought it might be necessary to acquire additional land in the area, he decided to deed the Burke tract to Murph Wilson, his former law partner and long-time friend and associate, in order to avoid the sudden inflation of surrounding land values which he had previously experienced when developing land held in his personal name. (App. 595-596, 598, 949-950.) This was accomplished by deed dated August 8, 1969, recorded August 20, 1969. (GX 21, App. 1118.) This was not only an accepted practice in the oil and gas real/estate business in the area generally (App. 90-91, 598), but was a very common, long-standing custom between Mr. Prothro and Wilson. (App. 59.)

2. *FHA Processing:* Regarding the apartment com-

plex itself, Mr. Prothro consulted his attorney, Nelson, about the project in early 1969 and determined that an attempt to qualify for FHA project mortgage insurance upon a multi-family project under §221 (d) (4) seemed the most likely to be approved at the time. (App. 857-858.) Deciding to proceed with such project, Prothro had Nelson arrange a pre-feasibility conference with Director Dee and his staff in July or August of 1969. (App. 857-859, 945-946.)

During the course of that conference, also attended by Vernon Castle (App. 858-859), the project was detailed in conjunction with maps and architectural renderings, and an inquiry was made of Prothro as to the price of the land which he readily revealed. For example, from the testimony of Norman Nelson:

> "Mr. Dee wanted to know how much he paid for the property, and Mr. Prothro told him that he had gotten a steal; he bought the property for two thousand dollars an acre because the guy didn't know what it was worth — And Mr. Dee said it was worth a lot more, and Mr. Prothro agreed." (App. 860-861.)

And, from the testimony of John Prothro:

> "Q. Was any inquiry made of you about what the land actually cost to you?
>
> A. Yes, sir.
>
> Q. And what, if anything, was said by you?
>
> A. Mr. Dee just flat asked me what I paid for it.
>
> Q. What did you say?
>
> A. I told him two thousand dollars an acre.
>
> Q. Did you make any other comment to him about it?
>
> A. Yes, sir.

> Q. What was that?
>
> A. I told him I thought I got an awfully good deal, and in the slang words, "by golly, I got a steal out of this thing."
>
> Q. And that was your view about the value of the land being more than the price you had to pay for it?
>
> A. Yes, sir." (App. 946-947.)

As a result of that pre-feasibility conference, Mr. Prothro was invited to file an application for mortgage insurance (App. 947), and he instructed Nelson to make such a submission on his behalf. (App. 950.) Nelson, in turn, forwarded the necessary information to John Huddleston, an FHA consultant or "packager" (App. 338-341) who had helped with the submissions on the Village East projects (App. 342), with instructions to prepare a Form 2013—Feasibility Application for Mr. Prothro. (App. 861-862.)

To comply with his understanding of FHA requirements in conjunction with such an application (as just described), Mr. Prothro took an option from the legal owner of the project property, Wilson, dated August 9, 1969, stating a dollar value of $21,780 per acre (GX 21A, App. 1121), and this was given Huddleston, who, in turn, attached it to the Form 2013—Feasibility which was subsequently filed on August 28, 1969. (GX 1, App. 1129, 347-348.) Essentially, that is all Prothro had to do with the 2013—Feasibility; previously, he had left signed, blank copies of the form with Huddleston in whom he had full faith and confidence, as an expert in the matter, to complete the form in accordance with FHA requirements. (App. 347, 350-352, 948, 950-951.)

In Huddleston's expert judgment, as a former FHA employee, the instructions for filling out §B (blocks

19-23), calling for a "***stipulated purchase price***" (GX 1, p. 4, App. 1132) did not ask for the "actual" or real acquisition cost *to the sponsor*, but sought instead the "value" of the land *to the project*. (App. 370, 372-373, 374.) Accordingly, Huddleston put the "option" price in that section to indicate the estimated value to the ultimate mortgagor (App. 369-370, 372-373), to-wit:

B. INFORMATION CONCERNING LAND OR PROPERTY:

19. Date Acquired	20. Purchase Price	21. Additional Costs Paid or Accrued	22. If Leasehold Annual Ground Rent	23. TOTAL COST	24. Relationship-Business Personal or Other Between Seller & Sponsor
Option Aug. 1969	$326,700	$	$	$326,700	none

Note, also, however that on page 2 of the form at Line H73 (to indicate the cash or indebtedness required for acquisition of land), Huddleston likewise inserted the "option" price as a "***proposed***" figure, indicating quite clearly that the dollar amount expressed in the option when used in the form is intended to be the "stipulated price" or value at which the sponsor will place the property into the project and which the ultimate mortgagor will pay for the land. (App. 1130.) Note also that Huddleston placed the same dollar amount in Line G70 to indicate the "***Estimated Market Price***" of the site. (GX 1, p. 2, line G70, App. 1130.) *

It was the attachment of the option to Form 2013—Feasibility, however, and use of the dollar amount in the form which the indictment alleges is the "concealment" or "coverup" of a material fact. (App. 1090.)

Upon filing Form 2013—Feasibility, FHA commenced its wholly in-house investigation by its various

* As a general rule, a sponsor will place land into the project at the FHA appraised value, but since that is not determined until after Form 2013—Feasibility is submitted, that is why the estimated acquisition cost is listed as "proposed" (App. 372).

departments (architectural, mortgage credit, valuation, and cost), an investigation to which the sponsor is not a party and has no input unless requested. (App. 351, 367, 377, 474, 795, 867.)

After a thorough and extensive appraisal, utilizing no less than five comparable sales in the area, FHA appraiser, Harold Hawkins, valued the Casa Grande site fully improved at $300,500 and $294,500 in an unimproved or "as is" condition. (GX 3A, p. 3, line J9 and J14 {1}, App. 1135.) In arriving at those figures per line J9 of Form 2264, an FHA appraiser is not, and should not be, influenced by any submissions on the part of the sponsor, particularly an "option". (App. 441, 794-797.) As former chief appraiser for FHA and current Deputy Director, Jake Waddle, testified:

"Q. Did you want in 1969 and 1970 an option to have anything to do or to have anything bearing upon the land value itself?

A. Well, I would have to rephrase that. I think — I would like to rephrase it, in I think what you're — that the option shouldn't have influenced the appraisal, should not influence the appraisal." (App. 794.)

And, also, from that of Carl Sears, Assistant Regional Administrator for HUD:

"Q. Directing your attention to the upper portion of the Page 3 {Form 2264, GX 3A, p. 3, lines J1-J8, App. 1135}, there are some comparable items there; are there not?

A. Yes.

Q. And is there anywhere in there — is there any indication as to the last arm's length transaction?

A. In the upper part?

Q. Yes.

A. No, sir.

Q. It plays no role, then, in those computations?

A. No, sir, it does not. (App. 441.)

And, finally, from the testimony of John Huddleston, a former FHA appraiser:

"Q. Does that form [2264] any place, either in Casa Grande or in South Point, ask the sponsor to identify an actual price paid for the land?

A. No, sir, I don't believe so.

* * * * *

"Q. When you were at FHA, you were an appraiser, is that correct?

A. Yes, sir.

Q. Did it make any difference to you, as an appraiser with FHA, the actual price the sponsor paid for the land?

A. No, sir.

"Q. What you were going to do is go out and you were going to appraise the land; is that correct?

A. Right." (App. 373-374.) *

Moreover, FHA did not request by letter or telephone any information concerning the sponsor's land acquisition cost as was its accepted procedure when it wanted that, or any other, information. (App. 405, 851.)

---

* It is true that Lines J12-J13 of Form 2264 ask for information concerning the sponsor's acquisition cost and that appraiser Hawkins, whether rightly or wrongly, used the Wilson-Prothro option as evidence of that cost. (GX 3A, p. 3, App. 1135.) The important thing to note, however, is that the information in Lines J12-J13 do not influence the independent FHA appraisal. As Jake Waddle testified: "Q. And are you familiar with item 12 on page 3 of that form? A. Well, I'm sure I am.*** Q. Does that particular item play any role in the appraisal process? A. No, sir. It's — in arriving at value and estimate of value, no, sir, it wouldn't influence — shouldn't influence the appraiser.***" (App. 801.)

After the FHA appraisal and processing by its various other sections, the agency issued a feasibility letter, dated February 11, 1970, inviting a "conditional" or "firm" application for insurance, stating that the maximum cost supportable for the project was $4,054,333, of which sum $300,500 — the FHA appraised value — was allocated to land and that the maximum insurable mortgage would be $3,648,900. (DX 77, App. 1139.) Thereupon, on March 16, 1970, Huddleston filed for Prothro a Form 2013—Conditional application (GX 2, App. 1143) in which the mortgagor's proposed indebtedness for land was reduced to the FHA's appraised value of $300,500 as was also the estimated market price included in the computation of total replacement cost. (See GX 2, p. 2, lines G70 and H13, App. 1144.)

The 2013—Conditional application was likewise processed through all sections of FHA. No change was made in its land valuation; the previously determined valuation of $300,500 was incorporated in all material portions of its Form 2264. (See DX 91, lines G70, H73, and N19, App. 1147-1148.) Thus, on April 14, 1970, FHA issued its conditional commitment stating that an application for insurance would be received on a project to cost $4,097,666, of which $300,500 was allocated to land with a maximum insurable mortgage of $3,687,900. (DX 74, App. 1151.)

At this point, on May 29, 1970, Murph Wilson deeded the land in question back to Mr. Prothro (DX 22), and, on June 1, 1970, Prothro in turn deeded a one-half interest in the land to W. D. Pardue, who was ultimately to become a fifty percent owner of the mortgagor entity. (GX 24.) FHA was notified of Pardue's potential ownership in the mortgagor entity by letter dated June 19, 1970. (In GX 18.)

Thereafter, on June 12, 1970, Huddleston filed for Prothro a Form 2013—Firm application for insurance

accompanied by final plans, specifications, cost breakdowns, et cetera, in which the estimated land indebtedness and estimated market price for the land as part of total replacement cost was still listed at the FHA appraised value, $300,500. (DX 73, p. 2, lines G70 and H73, App. 1154.) Likewise, this application cleared FHA processing. Again, no question was raised as to, and no changes were made in, the FHA appraised value of the land; indeed, Form 2264—Firm attaches Harold Hawkins' original valuation and incorporates it in the appropriate spaces, lines G70, H73 and N19. (See GX 6, pp. 2, 4, App. 1161-1163.)

On its Form 2264-A also dated July 2, 1970, and attached to DX 90, FHA determined that the maximum insurable mortgage for the project, based on replacement cost, was $3,687,900 (App. 1156), and, accordingly, on that same date it issued its commitment to insure a maximum mortgage in that amount. (App. 1158.)

About three weeks later, on July 28, 1970, Prothro and Pardue conveyed the land to the ultimate mortgagor, "Casa Grande Apartments", a Texas partnership owned equally by Prothro and Pardue. (DX 250, GX 18a.) The "initial closing" for the loan was set for August 13, 1970. The day before the closing, FHA's Form 2283 ("Financial Requirements for Closing") was prepared. (DX 99, App. 1164.) Its computation showed that the total cash required for construction, plus fees, et cetera, was $235,930 less than the maximum insurable mortgage as determined by FHA's Form 2264-A. (DX 72, App. 1156; DX 99, App. 1164.) As per line 42 of Form 2283 (DX 99, App. 1164) there was, accordingly, that much money listed as "Cash Available to Mortgagor,***". (DX 99, line 42, App. 1164.) Utilizing the figures in Form 2283, the mortgagor, Casa Grande, prepared its Form 2403, a request for the initial draw, asking for the amount as per line 42, Form 2283, under the designation "Land". (GX 5, p. 5, App. 1168.)

Form 2403 was prepared wholly by Norman Nelson and the amount requested for "Land" was determined solely from line 42 of FHA's Form 2283. (App. 872-874, 875-876, 894-895, 925.) In actual fact, there was no requirement that the money be used for that purpose; it was merely an amount of money available to the mortgagor as determined by Form 2283.* (App. 872, 875-876, 894-895, 930.)

Mr. Nelson explained the use of the designation "Land" on Form 2403 as follows:

> "Q. Did your sole information as to the amount attributable to the land come from an FHA docket — document, rather, or from an independent determination on your part as to the amount actually paid by the mortgagor entity?
>
> A. The amount that's shown on FHA Form 2283 is the amount that FHA will allow to be drawn out. It can be drawn out for land or anything else. I would put "land" there because it was one item that was listed in the replacement cost. It's the amount of money that's available to the mortgagor, but there's no requirement that it all be spent for the land." (App. 930.)

---

* The FHA "Underwriting Manual" (GX 90A, App. 1175) (with which Prothro was not familiar — App. 960) limited the amount initially distributable per Line 42, Form 2283, to the lesser of FHA's "as is" appraisal value (Form 2264) or "***the actual purchase price thereof***". (GX 90, App. 1175.)

Every witness who testified (except one), including the deputy director, Olin Parnell, who approved both projects involved here, agreed that the phrase "actual purchase price" meant the sum which the *mortgagor entity* was to pay for the property. (App. 766-767, 773, 873-874.)

FHA employee, Carl Sears, thought the phrase applied to the sponsor's acquisition cost, although he conceded that there was no FHA procedure or form by which the "actual purchase price" to the sponsor is ascertained. (App. 447, 463.)

The sum of $235,930 was, in fact, disbursed to the mortgagor at the initial closing along with all other permissible fees and expenses (GX 50, App. 1165) and was deposited to the bank account of the mortgagor. (GX 76.) The total amount of the initial advance, of course, was insured by FHA. (App. 445-446, 719-720.)

About a year later, Prothro assigned his interest in the Casa Grande partnership to W. E. Curtis, thereby terminating his involvement in the project. (In GX 18.) Ultimately, however, the total loan insured by FHA was fully disbursed and, although it could have done so at the final closing, FHA did not disallow any of the mortgagor's expenditures for land. (See GX 11, App. 1178.) Instead, in computing the ultimate mortgage it would insure via its Form 2580, FHA adopted and utilized its original "as is" land value as initially computed on its Form 2264. (GX 11, line 5, schedule 2, App. 1178.)

Thus, from beginning to end, that portion of the advances and ultimate mortgage insured by FHA which was attributable to land was based upon — and solely upon — the original, independent appraisal of value by Harold Hawkins which, according to the testimony, was not, and could not have been, influenced by any of the sponsors' submissions.

B. The South Point Project

The South Point project developed, was processed, and concluded in much the same manner, viz:

1. *Land Acquisition:* In late 1969, Mr. Prothro became aware of a need in Tyler, Texas, for a mobile home park. (App. 952.) He made a study of available land and located a suitable tract for such a park which was owned by the Marsh-McIlwaine heirs. (App. 952-953.)

On December 29, 1969, Prothro was given an "informal" option to purchase the land for $1,000 an acre

(GX 120, App. 1189; 136, 150-151), which was an extremely favorable price, as is evidenced even by the comments of one of the sellers. (GX 120D.) This initial, "informal" option was extended another sixty days at the request of Mr. Prothro. (GX 120B.)

During this period of time, a joint venture for the development of a mobile home park was entered into between Prothro, W. E. Curtis, Lonnie Holotik and Tony Howard (App. 175, 211-212), all local businessmen, the latter of whom had tried unsuccessfully to get FHA insurance on a similar project. (App. 173-178.) Each member of the group was to have a twenty-five percent interest in the project. (App. 212.) Holotik was to secure the option on the land, deal with the City of Tyler relative to water and sewer connections, et cetera. (App. 192, 211, 956.) Howard was to supervise construction and work with Holotik regarding the land. (App. 148, 176-177, 191-192.) Prothro and Curtis were to take care of all necessary paper work with FHA. App. 213-214.)

Holotik did, in fact, secure an option contract for purchase of the property on May 25, 1970, and that option was later extended to March 10, 1975, by Holotik's check dated September 18, 1970. (GX 122, App. 1208; 161.)

A one-twelfth interest in the land was conveyed to Prothro and Holotik, d/b/a South Point Park, by a guardian's deed dated November 25, 1970, and recorded March 15, 1971. (GX 123.) The balance of the tract was conveyed to the same parties by warranty deed dated March 10, 1971, and recorded March 15, 1971. (GX 124.)

2. *FHA Processing:* As was the case with Casa Grande, a pre-feasibility meeting relative to the mobile home project was arranged by Mr. Nelson and held

between Prothro, Nelson, Director Dee and two members of his staff, Jake Waddle and Vernon Castle. (App. 881.) At this meeting, the price of the project property was again asked for and Prothro candidly revealed it, stating it to be $1,000 per acre. (App. 882, 954.) Specifically, Mr. Nelson testified:

> "Mr. Prothro had a plat of the land, and he discussed the terrain of it, and I believe it was 91 acres in all —
>
> And Mr. Dee wanted to know what he had to pay for the property; Mr. Prothro indicated that it was to cost a thousand dollars an acre, but was worth a lot more." (App. 882.)

This was confirmed by the testimony of Mr. Prothro; as follows:

> "Q. At that meeting, was any question asked of you as to the price that the land was going to cost you?
>
> A. Yes, sir.
>
> Q. And what did you say?
>
> A. I said that I bought it for a thousand dollars an acre.
>
> Q. At that time, had you actually acquired title to the property in early 1970?
>
> A. No, sir.
>
> Q. Now, isn't it true that what you had was that letter of December 29th, 1969, from Mr. Richardson to yourself?
>
> A. Yes, sir." (App. 954.)

As a result of this conference, Prothro was invited to submit an application for insurance on the proposed project whereupon Prothro instructed Huddleston to

file a Form 2013—Feasibility application, which he did on March 23, 1970. (GX 100a, App. 1141.) On this particular feasibility application, ¶B, "Information Concerning Land or Property", was left blank but the estimated market price and the "proposed" land indebtedness to the mortgagor was shown as $300,000 on the appropriate lines in the application. (GX 100a, p. 2, lines G70 and H73, App. 1192.)

Three days later, on March 26, 1970, in direct response to Huddleston's request that Prothro give some evidence of "site control" to satisfy FHA's requirement (App. 355), Prothro obtained an option from his coventurer Howard, stating a dollar amount, as FHA wanted (DX 302, App. 1180), in the amount of $300,000 — the same value which had been listed in the previously filed 2013—Feasibility application. (GX 121A, App. 1194.) This option was prepared by Mr. Prothro's secretary by merely copying the option form previously supplied by Mr. Nelson for use in conjunction with the Village East projects, and it was in the same form as the options used in those projects and in Casa Grande. (App. 891, 951, 959.) The format of the options, i.e., from one sponsor to the other, was comparable to those options which FHA approved and condoned in conjunction with Canterbury Village Apartments and Jackson Manor Apartments, Ltd. (App. 904-905), with which projects Mr. Prothro was not affiliated.

The feasibility application was duly processed through FHA and, in an independent appraisal conducted April 6, 1970, by FHA appraiser, Vernon Roper, the land for the project was valued at $255,660 fully improved or $235,200 in an "as is" condition, based upon five comparable sales of like property. (GX 103, line J9 and J14 [7], App. 1149.) Accordingly, on April 24, 1970, FHA issued its feasibility letter inviting Prothro to make a "conditional" or "firm" application for insurance upon a total project to cost $1,435,222 of

which $235,200 was allocable to land with a total maximum insurable mortgage of $1,291,700. (App. 1205.)

In response to that letter, a 2013—Conditional application, with preliminary plans and specifications, was filed August 19, 1970. (GX 101b, App. 1215.) Yielding to the FHA appraisal, the application reduced the estimated market price of the land and the proposed cost thereof to the mortgagor by insertion of the FHA appraised value in lines G70 and H73. (GX 101b, p. 2, App. 1216.) This application, too, sailed through FHA processing via Forms 2264 and 2264-A (App. 1197, et seq.; 1203), and resulted in a conditional commitment letter dated September 24, 1970, inviting an application for a firm commitment upon precisely the same figures outlined in the feasibility letter, the total allocable to land again being the FHA appraised value, $235,200. (App. 1219.)

The 2013—Firm application, which was filed November 20, 1970 (GX 101c, App. 1224) with final plans, specifications, cost breakdowns, et cetera, was likewise routinely processed through FHA with no changes in the foregoing figures, except that the maximum insurable mortgage, as computed on Form 2264-A-Conditional (App. 1203), was lowered to $1,267,700 due to a reduction in construction cost, but that portion of "total replacement cost" allocable to land remained the same, $235,200. (GX 101c, p. 2; App. 1225.) Final commitment for insurance in the foregoing amount was issued March 10, 1971 (App. 1234), and the loan was set for "initial closing" on March 11, 1971. (In GX 118-119.)

The same day as the closing, FHA prepared its Form 2283, "Financial Requirements for Closing" (DX 171, App. 1230), and, since the total cash necessary to construct the project was $139,333 less than the maximum insurable mortgage as computed by Form 2264-A, that amount was approved, per Line 42 of Form 2283, as

"Cash Available to Mortgagor" and distributed to the mortgagor upon its request for distribution of that sum in Form 2403 (prepared from the information in Form 2283 — App. 875) under the designation "Land", for the same reasons as indicated previously in regard to Casa Grande. (See GX 104, App. 1240; DX 171, App. 1230.)

The mortgagor entity came into existence the day of the closing as a general partnership owned equally by Mr. Prothro and Lonnie Holotik. (In GX 119.)

Ultimately, the full loan approved for the project was disbursed and, in computing the final maximum insurable mortgage, per FHA Form 2580, after all costs were complete and certified, FHA again utilized the "as is" value Vernon Roper had originally placed on the property in preparing the Form 2264—Feasibility; FHA made no disallowance for land cost to the mortgagor at the time of closing (GX 107, App. 1248), although it knew from its files at that time precisely what the land had cost the sponsors. (See GX 109, p. 4.)

So, again, from beginning to end, that portion of the ultimate mortgage amount insured by FHA which represented the value of the land in the project was determined by — and solely by — the initial, independent FHA appraisal which did not, and could not, take into account the sponsor's acquisition cost and, thus, was not capable of being influenced thereby.

The foregoing, hopefully, gives the court a basic understanding of the context out of which the "crime" alleged here arose.

No. 75-1138

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN ELWYN PROTHRO, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

WILLIAM G. OTIS,
MADELINE S. CAUGHEY,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1975, and a petition for rehearing was denied on January 14, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on February 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish a violation of 18 U.S.C. 1001.

2. Whether the testimony of an FBI agent should have been excluded under the Jencks Act because he destroyed his rough notes of an interview with petitioner, even though the final typewritten report of the interview was furnished to defense counsel.

STATUTES INVOLVED

The relevant statutes, 18 U.S.C. 1001 and 3500, are reproduced in pertinent part at Pet. 2-3.

STATEMENT

In 1968 and 1969, petitioner was the principal developer of two Texas construction projects, the Casa Grande Apartments and the South Point Mobile Home Park. His conviction arose out of his application to the Department of Housing and Urban Development (HUD) and the Federal Housing Administration (FHA) for mortgage insurance on the two projects. By overstating the costs incurred in acquiring the sites, petitioner had obtained funds substantially in excess of those to which he was legally entitled.

The evidence at trial showed that in late 1968 or early 1969 petitioner purchased, for approximately $2,000 an acre, a 32-acre tract of land for the construction of the Casa Grande Apartments. Approximately four months later, petitioner purported to transfer the property to Murph Wilson, a business and personal associate; Wilson signed an agreement purporting to transfer the property back to petitioner for $21,780 per acre (Tr. 24, 31, 34, 38-39, 56-57). In fact, Wilson neither paid money for the property when it was conveyed to him nor received any consideration when he later transferred the property back to petitioner (Tr. 80).

In December 1969, petitioner obtained an option from Citizens First National Bank to purchase a 92-acre

parcel of land for $1,000 per acre for the construction of the South Point Mobile Home Park (Tr. 127-129, 154). He thereafter executed an agreement between himself and one of his partners, Anthony Howard, which represented that Howard was the seller of the land and that the purchase price was $300,000 rather than the actual $91,000. Howard never had title to the property, nor did he receive any consideration for signing the agreement (Tr. 172-178).

As evidence of site control and cost of acquisition of the properties, petitioner submitted to the FHA the Wilson and Howard agreements along with a Feasibility Application. FHA then made its own appraisals of the two sites and valued the Casa Grande site at $294,500 in its unimproved condition and the South Point Park site at $235,200 (Pet. App. D-7, D-15). FHA approved petitioner's application and issued commitments to insure the mortgages on the two projects.

The agency determined that the total funding required to complete the Casa Grande and South Point Park projects was, respectively, $235,930 and $139,333 (Pet. App. D-10, D-16), and the agency paid those amounts to petitioner at the initial closings.[1] Under FHA regulations, however, the maximum amount to which petitioner was entitled was the lesser of FHA's appraisal of the value of the land and petitioner's actual acquisition costs (Pet. App. D-11); petitioner's actual acquisition costs were $65,414 and $91,000. Thus, petitioner was entitled only to those amounts and not to the greater amounts that

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[1]The amounts paid petitioner were calculated according to FHA regulations. They represented the difference between the FHA appraised value and the maximum insurable mortgage on each project (see Pet. App. D-10).

he obtained as a result of his overstatement of the costs of acquisition.

After a jury trial in the United Stated District Court for the Northern District of Texas, petitioner was convicted on two counts of concealing a material fact within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. 1001. He was sentenced to three years' probation and fined $10,000. The court of appeals affirmed without opinion (Pet. App. A).

ARGUMENT

1. Petitioner contends (Pet. 5-9) that the evidence was insufficient to establish a violation of 18 U.S.C. 1001. The evidence was, however, sufficent to support the jury's finding of guilt. *Glasser* v. *United States*, 315 U.S. 60, 80.

a. Petitioner first asserts (Pet. 5) that there was no "concealment" on his part within the meaning of the statute, because he allegedly disclosed the purchase price of the properties to an FHA official at two preliminary "prefeasibility conferences." But testimony at trial established that the FHA prefeasibility conference is an informal proceeding, the only purposes of which are to discuss a proposed project in general terms and to determine whether funds are available and, if so, whether the application process should be initiated (Tr. 449-451). The conference occurs before any file has been established by FHA (Tr. 904) and before the submission of the Feasibility Application (Form 2013). If the FHA Director believes that a project is viable, he will invite the filing of an application (Tr. 451). However, no FHA file comes into existence unless a specific application is submitted.

Norman Nelson, the attorney who represented petitioner in his dealings with the FHA, testified that petitioner

disclosed the actual purchase prices of the land sites to FHA official Ed J. Dee at the prefeasibility conferences (Tr. 855-857, 877-878).[2] However, these disclosures do not disprove concealment because, in the formal applications that petitioner later presented—the first documents to become a part of petitioner's FHA file—petitioner misstated and concealed the true cost.[3] Moreover, by filing the agreements signed by Wilson and Howard, petitioner successfully concealed from the officials responsible for disbursements of funds that he had acquired the properties at much lower prices.[4]

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[2]Nelson testified that when Dee asked petitioner at the conference on the Casa Grande project, held in the summer of 1969, what he had paid for the property, petitioner responded that he had got it for a steal at $2,000 an acre (Tr. 855-857). Nelson further testified that at the conference held on the South Point Park project in February 1969, petitioner told Dee that the land had cost $1,000 an acre but was worth a lot more (Tr. 877-878).

[3]The cases upon which petitioner relies for his argument that Dee's knowledge should be imputed to the FHA are inapposite. In *United States* v. *Shelby Iron Co.*, 4 F.2d 829, 832 (C.A. 5), reversed and remanded, 273 U.S. 571, the knowledge imputed to the agency was imparted to an agency official through a formal clause in a government contract. In *United States* v. *Hanna Nickel Smelting Co.*, 253 F. Supp. 784, 794-795 (D. Ore.), the government officials were under a duty to convey to their superiors the knowledge which the court imputed to the agency. In *United States* v. *Long*, 14 F. Supp. 29, 30-31 (D. Mass.), there was no concealment of information from agency officials.

[4]Contrary to petitioner's related claim (Pet. 5-6), the jury properly could find on the evidence before it that the concealment was effectuated by a "trick, scheme, or device," within the meaning of the statute. Petitioner got Wilson to sign an agreement purporting to transfer the Casa Grande property back to petitioner at an inflated price, when in fact Wilson never paid or received money for the property, and petitioner then submitted this agreement to FHA as evidence of the cost of acquisition of the property. By this "trick, scheme, or device", he concealed from FHA the

b. Petitioner argues (Pet. 6-7) that the evidence was insufficient to prove intent to conceal because there was no evidence that he was familiar with the applicable FHA regulations and procedures. However, the jury was correctly instructed on the *scienter* required for a conviction under the statute (Tr. 1056-1057, 1063, 1065), and there was ample evidence to warrant its conclusion that petitioner did not enrich himself through accident or inadvertence.

As petitioner concedes (Pet. App. D-1), the attorney with whom he coordinated these ventures was "experienced in FHA matters." Moreover, petitioner himself negotiated with the original owners of the properties used for the two projects. He caused the Casa Grande property to be deeded to Wilson, and he prepared the agreements that he induced Wilson and Howard to sign.

c. Petitioner also claims (Pet. 7-9) that his acquisition cost was not a material fact and, hence, that its misrepresentation was not illegal. However, the requirement of materiality does not mean, as petitioner suggests (Pet. 7-8), "that a concealed fact actually pervert the function of a governmental agency." Rather, the test is whether the false statement has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made. *Weinstock* v. *United States*, 231 F.2d 699, 701 (C.A.D.C.); *United States* v. *Krause*, 507 F.2d 113, 118 (C.A. 5);

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fact that he had already gained control of the property independently of this agreement at the cost of only $2,000 per acre, rather than the $21,780 per acre indicated by the agreement with Wilson. Petitioner used a similar "trick, scheme, or device" in filing the agreement signed by Howard to conceal from FHA the true cost of the South Point Park property.

United States v. *East*, 416 F.2d 351, 353 (C.A. 9). It is not necessary that the government agency actually be influenced by the false statement or concealment (*United States* v. *Gonzales*, 286 F.2d 118, 122 (C.A. 10)), or that the government actually rely on the statement or concealment (*Blake* v. *United States*, 323 F.2d 245, 247 (C.A. 8)).[5]

In any event, petitioner's submission of the inflated cost figures did affect the government's functions. First, HUD was denied the opportunity of reviewing FHA appraisals that exceeded the cost of acquisition to the developer.[6] Second, both the funds paid to petitioner at the initial closings and the value of the insurance liability HUD incurred far exceeded the amounts for which the government would have been responsible had petitioner's Feasibility Application not concealed his true costs. See pp. 3-4, *supra*.

2. Petitioner claims (Pet. 9-11) that the trial court erred in refusing to exclude the testimony of FBI Agent Wilton Bremer because Bremer, following standard FBI practice, disposed of his rough notes of an interview with petitioner and refreshed his recollection by referring

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[5]*Tzantarmas* v. *United States*, 402 F.2d 163, 168 (C.A. 9), certiorari denied, 394 U.S. 966, and *United States* v. *East*, *supra*, upon which petitioner relies, likewise hold that the test of materiality is whether the falsification *could* affect or influence governmental functions.

[6]Petitioner concedes that under FHA procedures a discrepancy between appraised value and sponsor acquisition cost requires additional documentation and explanation (Pet. 8).

to the final typewritten report he had prepared from those notes.[7]

While it is theoretically possible that the rough notes of an FBI agent might in some circumstances be a Jencks Act "statement" within the meaning of 18 U.S.C. 3500(e), such was not the case here. Petitioner concedes (Pet. 10, n. *) that the notes were not his own substantially verbatim oral statements, producible under 18 U.S.C. 3500(e)(2), nor were they a factual narrative account written by petitioner himself, producible under 18 U.S.C. 3500(e)(1). For all that appears in the record, the notes constituted no more than an incomplete summary of an interview with petitioner, written by the agent, and they were therefore not producible under the Jencks Act. *Palermo* v. *United States*, 360 U.S. 343, 350-351. The fact that Agent Bremer compared his final report with the notes "for accuracy" (Pet. 10, n. *) is no indication that petitioner "adopted" or "approved" the notes within the meaning of 18 U.S.C. 3500(e)(1).[8] Nor does that fact transform the agent's rough notes of what petitioner told him into a written statement of the agent himself.

As the Court stated in *Killian* v. *United States*, 368 U.S. 231, 242:

> If the [FBI] agents' notes * * * were made only for the purpose of transferring the data thereon to the receipts * * * and if, after having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right.

See also *United States* v. *Augenblick*, 393 U.S. 348, 355-356. Accordingly, the Jencks Act did not require preservation and production of the agent's rough notes.[9]

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[7]Bremer's interview with petitioner occurred on September 25, 1972. His final report was prepared four days later (Tr. 595-596), and was furnished to defense counsel at or before trial (Tr. 564-566).

At trial, Bremer testified that, during the interview, petitioner admitted to him that Howard was his partner and that he had asked Howard to sign the agreement reflecting a price of $300,000 in order to establish a basis in the land so that the project might be sold to a local investor at a profit (Tr. 587). Petitioner further stated in the interview that he had in fact purchased the land for $1,000 an acre, and that the $300,000 figure was used in order to obtain an operating cushion or contingency money (Tr. 586, 588).

As to the Casa Grande project, petitioner told Bremer that he had purchased a 32-acre tract for approximately $65,000, and had deeded the land to Wilson (Tr. 589-590). Petitioner stated that no consideration passed between himself and Wilson for the land and that his reasons for using the option, reflecting a price of $21,780 per acre, were the same as those in the South Point Park project (Tr. 591).

[8]"[D]iscussions of the general substance of what the witness has said do not constitute adoption or approval of the [interviewer's] notes within §3500 (e)(1), which is satisfied only when the witness has 'signed or otherwise adopted or approved' what the [interviewer] has written. This requirement clearly is not met when the [interviewer] does not read back, or the witness does not read what the [interviewer] has written." *Goldberg* v. *United States*, No. 74-6293, decided March 30, 1976, slip op. 15-16, n. 19. See also *id.*, concurring slip op. 1-4 and n. 2 (Stevens J.); *id.*, concurring slip op. 9-11 (Powell, J.).

[9]Petitioner's reliance upon *Jencks* v. *United States*, 353 U.S. 657, for the proposition that he "was entitled to the handwritten notes under the due process guaranteed him by the Fifth Amendment" (Pet. 10), is misplaced. As the Court has made clear, the *Jencks* rule is not of constitutional dimension. *United States* v. *Augenblick*, *supra*, 393 U.S. at 356; *Scales* v. *United States*, 367 U.S. 203, 258; *Palermo* v. *United States*, *supra*, 360 U.S. at 345.

A few courts have disapproved the FBI's practice of not preserving agents' rough notes of witness interviews,[10] but no court has held that the destruction of rough notes in accordance with established practice requires suppression of the agent's testimony, and seven circuits have held to the contrary.[11] While a panel of the District of Columbia Circuit recently stated in *dicta* that in the future it will impose sanctions for the FBI's failure to preserve rough notes of witness interviews, it affirmed the convictions in the case before it. *United States* v. *Harrison,* 524 F.2d 421, 434-435 (C.A. D.C.). [12] Although

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[10]See *United States* v. *Missler,* 414 F.2d 1293, 1304-1305 (C.A. 4), certiorari denied, 397 U.S. 913; *United States* v. *Thomas,* 282 F.2d 191, 194 (C.A. 2); but see *United States* v. *Covello,* 410 F.2d 536, 545 (C.A. 2), certiorari denied, 396 U.S. 879.

[11]See cases collected in *United States* v. *Harrison,* 524 F.2d 421, 429-432 and n. 25 (C.A. D.C.) The cases on which petitioner relies for his argument that Bremer's testimony should have been suppressed for failure to produce his rough notes are inapposite. In both *United States* v. *Sheer,* 278 F.2d 65, 67 (C.A. 7), and *United States* v. *McCarthy,* 301 F.2d 796, 797 (C.A. 3), the defense was denied access not to the government agent's rough notes but to the agent's written report. *United States* v. *Lonardo,* 350 F.2d 523, 529 (C.A. 6), involved the destruction of a stenographic transcript of a witness' statement where the defendant had not been furnished the final report or otherwise provided with the information contained in the statement. In *United States* v. *Johnson,* 337 F.2d 180, 202 (C.A. 4), affirmed and remanded, 383 U.S. 169, the court held that the FBI agents' notes of interviews did not qualify as a statement within the meaning of the Jencks Act.

[12]The panel in *Harrison* expressed the view that FBI agents' rough notes were "potentially discoverable materials" under *Brady* v. *Maryland,* 373 U.S. 83, and that the failure to preserve them should result in the exclusion of testimony (524 F.2d at 434-435).

actual imposition of a sanction may create a conflict requiring resolution by this Court, at present review of the issue raised by petitioner would be premature.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

WILLIAM G. OTIS,
MADELINE S. CAUGHEY,
Attorneys.

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[13]Petitioner's suggestion (Pet. 9) that Agent Bremer's final report was unreliable or distorted is unsupported. The fallacies in the report to which petitioner refers were not more than typographical errors that in no way affected the report's reliability. The "substantial editorial notes" were penciled underlinings and notations, consisting primarily of form numbers and dates, which Bremer testified he had made in the week prior to trial in preparation for trial (Tr. 642-645). In the changed sentence to which petitioner refers, the word "no" was penciled in because it had been omitted inadvertently (Tr. 603, 662). Indeed, the fact that petitioner was able to engage Bremer in a detailed cross-examination based on the agent's typewritten report shows both that petitioner suffered no prejudice because the rough notes were unavailable and that the letter and purpose of the Jencks Act were fully satisfied.

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